

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Wausau, WI

WAOW/WYOW TELEVISION, INC.¹

Employer

and

RONALD C. STANGE

Case 30-RD-1486

Petitioner

and

**WISCONSIN BROADCAST ENGINEERS, LOCAL UNION 715,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO-CLC²**

Union

DECISION AND DIRECTION OF ELECTION

INTRODUCTION³

The Union represents the stipulated bargaining unit of “[a]ll full-time and regular part-time engineers and master control employees employed by the Employer at its Wausau, Wisconsin facility[;] excluding reporters, news photographers, on-air personnel, sales employees,

¹The name of the Employer appears as amended at hearing.

²The name of the Union appears as amended at hearing.

³ Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended (“Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“Board”). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds: (1) the hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed; (2) the Employer is engaged in the broadcast news business from its Wausau, Wisconsin location; (3) during the past calendar year, a representative period, the Employer had gross volume of business in excess of \$100,000, advertised national brand products and was a member of the Associated Press, utilizing its services; (4) as such, Respondent is engaged in interstate commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction; (5) the Union is a labor organization within the meaning of the Act; and (6) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act. The Employer has submitted a timely brief which has been considered.

traffic employees, production department employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.” On September 27, 2007, the Petitioner filed the present decertification petition. The petition was blocked pending the Region’s investigation into unfair labor practice charges. The final pending unfair labor practice investigation was closed on December 29, 2008, and the Region resumed processing the petition. On January 9, 2009, the Union moved to dismiss the petition, claiming the unit now consists of one employee (James Sward) and the Board lacks jurisdiction over stable one-person units. The Employer and Petitioner claimed the Board has jurisdiction because the Petitioner is also part of the unit, making it a two-person unit. On January 9, 2009, the undersigned denied the Union’s motion to dismiss and directed that the matter proceed to hearing over the size of the unit.

The issue is whether the Petitioner is a member of the bargaining unit. If so, the petition proceeds to election over a two-person unit in which both persons are eligible to vote. If not, the petition would be dismissed because the Board lacks jurisdiction over one-person units.

Based upon the evidence, I conclude the Petitioner is a member of the bargaining unit as a dual-function employee that shares a sufficient community of interest with the undisputed bargaining unit member (Sward), resulting in a two-person unit in which both persons are eligible to vote.

FACTUAL SUMMARY

The Employer operates FCC-licensed television stations in Wausau, Wisconsin. It broadcasts ABC network programming, syndicated programming, live news, weather, sports programming, and emergency alerts. The Employer has seven departments: engineering, production, programming, news, sales, promotions, and administrative. There currently are 48 full-time employees working at the station.

Those performing engineering and master control duties are responsible for recording network and syndicated programming, preparing these programs for airing, and handling commercial, promotional and other announcements for airing. Those in the production department are primarily directors who produce live newscasts, commercial productions, and sometimes promotional productions.

The Employer is a wholly owned subsidiary of Quincy Newspapers, Inc. ("QNI"). In 2005, QNI implemented a master control centralization plan whereby one location or station would be used to remotely operate master control for other QNI stations in the area. In September 2007, the Employer informed the Union that the LaCrosse, Wisconsin station (WXOW) would begin handling master control operations remotely for the Wausau stations (WAOW/WYOW). As a result of the change, the Employer informed the Union that three full-time Master Control Operator positions would be eliminated, one (Sward) would be retained, and one (the Petitioner) would be transferred to "the Production/Programming Department with primary responsibility in programming and production."⁴

After this change, the Petitioner continued to regularly perform master control work in addition to production work. From the third quarter of 2008 to the present, the Petitioner regularly performed master control work for at least 12 to 15 hours a week (except during a two-week vacation). The rest of his work week is spent performing production and programming work. There were weeks in December 2008 and January 2009 when the Petitioner worked more than 20 hours performing unit work. When the Petitioner performs bargaining unit work, he performs the same tasks as the full-time master control operator (Sward), is subject to the same

⁴ It appears from the record that the unit consisted of five or six employees prior to the change, but Sward and the Petitioner are the only two who remain.

supervision, and receives the wages and benefits in accordance with the collective-bargaining agreement.

The parties' current collective bargaining agreement, dated December 1, 2008 through November 30, 2009, was executed on December 12, 2008. Section 6.2 states, in pertinent part, that "[a] regular part-time employee is a person normally scheduled to work in an engineering or master control position for more than ten (10) hours a week, but less than forty (40) hours a week." This language in Section 6.2 is the same as it was in prior agreements. Moreover, on the last page of the current agreement, as well as on the last page of the prior collective bargaining agreement, the parties list in an attached Schedule B the names and seniority dates of the employees covered by the agreement. The lists attached to the current and prior agreement identify Ronald Stange and James Sward as the two employees covered by the Agreement.

ANALYSIS

As previously stated, the dispute is over the size of the unit. The Union contends the unit consists of one employee (James Sward), and the petition should be dismissed because the Board lacks jurisdiction over one-person units. The Employer and the Petitioner contend it is a two-person unit because the Petitioner qualifies as a regular part-time engineer and master control employee under the Board's dual-function analysis, as well as under the express language of the parties' recent collective bargaining agreement.

The bargaining unit consists of *all full-time and regular part-time engineers and master control employees* employed by the Employer at its Wausau, Wisconsin, facility; excluding reporters, news photographers, on-air personnel, sales employees, traffic employees, *production department employees*, office clerical employees, guards and supervisors as defined in the National Labor Relations Act. The record establishes the Petitioner regularly performs work as a

master control employee (included) and performs work as a production department employee (excluded).

Employees who perform more than one function for the same employer are considered by the Board to be dual-function employees. *Berea Publishing*, 140 NLRB 516 (1963). The test for determining whether a dual function employee should be included in a unit is “whether the employee [performs unit work] for sufficient periods of time to demonstrate that [he or she] ... has a substantial interest in the unit’s wages, hours, and conditions of employment.” *Id.* at 518-519; see also *Continental Cablevision*, 298 NLRB 973 (1990); *Alpha School Bus Co.*, 287 NLRB 698 (1987); and *Oxford Chemicals*, 286 NLRB 187 (1987). The Board has no bright line rule as to the amount of time required to be spent performing unit work but rather makes this determination according to the facts of each case. See, e.g., *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 820 (2003) (driver averaging nine hours a week from his hire date to date of election was sufficient to warrant inclusion); *Martin Enterprises, Inc.*, 325 NLRB 714, 715 (1998)(operator who spent at most ten percent of his time working with operators was not eligible as a dual-function employee); *Pacific Lincoln Mercury*, 312 NLRB 901 fn. 4 (1993) (employee who spent five to ten percent of time performing unit work did not qualify as a dual-function employee); *Oxford Chemicals*, *supra* (employee who regularly performed unit work for twenty-five percent of each day was included in the unit); *Davis Transport*, 169 NLRB 557, 562-563 (1968) (employees who spent less than three percent of their time performing unit work during ten-month time period were not included in unit); and *Mc-Mor-Han Trucking Co.*, 166 NLRB 700, 702 (1967) (employee who drove truck on twenty days during the year--with no regularity, pattern, or consistent schedule--was excluded from unit of truck drivers).

From mid-November 2008 to the present (with the exception of a two-week vacation) the Petitioner regularly spent between 10 to 25 hours a week performing master control work for the Employer. The Petitioner testified he spent approximately the same amount of time performing this work prior to November 2008. As previously stated, while performing this work, the evidence establishes the Petitioner is performing the same tasks as Sward, is subject to the same supervision, and also is being paid wages and benefits in accordance with the Collective Bargaining Agreement. Based upon this evidence, I conclude that the Petitioner is a dual-function employee who shares a sufficient community of interest to be included in the unit.

As previously stated, the language of the parties' current agreement also supports the inclusion of the Petitioner in the bargaining unit. I view the Union's agreement to the language in Section 6.2 regarding the definition of a "regular part-time" employee, as well as its agreement to have the Petitioner specifically named as one of the employees covered by the agreement, as a clear admission that the Union considers the Petitioner to be part of the bargaining unit. See generally *Butler Asphalt LLC*, 352 NLRB No. 32, slip op. at 2 (2008).

The Union did not present evidence to refute any of the above. But, rather it raised three arguments for why the Petitioner should not be included in the unit.

First, the Union points to the Employer's September 2007 Master Control Reorganization Plan, which states the Petitioner would be transferred to the Production/Programming department, as evidence that the Petitioner is no longer in the unit. The Master Control Reorganization Plan, in fact, also stated the Petitioner would be "transferred to the Production/Programming department with *primary* responsibility in programming and production." (emphasis added). There is nothing in the document stating the Petitioner no longer would be performing engineering or master control operation work. Moreover, after the

announcement, the Union's attorney requested information relating to the Employer's Master Control Reorganization Plan, specifically what duties the remaining employees (including the Petitioner) were going to be performing. On November 19, 2007, the Employer, through its attorney, responded to the information request and addressed the Petitioner's duties, stating that he was moved to the Production Department where, among other things, he may work the early morning news and prepare the control room for the day. The letter, however, goes on to state:

[The Petitioner] may also perform Master Control Operator duties on occasion. In that capacity, he will prepare shows, train other people on Master Control Operator duties if needed, get remotes ready, operate live trucks and repair equipment as necessary. He will also operate transmitter sites and troubleshoot on air problems.

Based upon this evidence, I find the Employer never informed the Union that the Petitioner was no longer going to be performing unit work or no longer was part of the unit.

Second, the Union points to the Employer's responses to its quarterly information requests from late 2007 and through 2008 and states that the Employer failed to provide the Union with information establishing that the Petitioner was continuing to perform unit work. In these requests, the Union asked for the names, contact information, hours worked, and earnings for employees working as Part-time Engineers or Temporary Engineers. The administrative assistant (Tricia Shairer) who responded to the Union's quarterly requests answered that the Employer did not employ any Part-time or Temporary Engineers. The Employer's president and general manager testified that he believed that the administrative assistant viewed the Petitioner as a full-time employee, and she made a mistake in viewing the request as seeking something other than full-time employees.⁵

⁵ Schairer did not testify at the hearing.

Despite any mistake this administrative assistant may have made, during an October 28, 2008 bargaining session, the Union's business representative requested the name, contact information, hours worked, and wages for "any employee who performed Master Control or Maintenance Engineer tasks during the 3rd quarter of 2008, notwithstanding whether the employees held the positions of Part-time Engineer, Temporary Engineer, or some other position." On November 5, 2008, the Employer's attorney responded to the request by providing the Union with a breakdown of the hours worked and wages paid to employees who performed the above work, including an estimate of the hours the employees spent performing unit work during the third quarter of 2008. This November 5 correspondence specifically included the Petitioner as someone who spent an estimated 12 to 15 hours a week performing such work during the third quarter of 2008, and was paid in accordance with the contract when performing such work.

Based upon this evidence, I conclude the Employer—when specifically asked—made clear that the Petitioner was continuing to perform bargaining unit work, regardless of what his actual title or classification was at the time.

Finally, the Union asserts that during conversations or in correspondence since 2007, the Petitioner informed the Union that he was no longer in the bargaining unit and was no longer going to be paying Union dues. The Union further established that the Petitioner stopped paying his Union dues.⁶ The Union relies upon this to support its claim that the Petitioner was, in fact, no longer part of the bargaining unit.

⁶ The current and prior collective bargaining agreements contain a union-security clause but do not provide for dues check-off. In early 2008, the Petitioner in response to receiving a letter from the Union regarding his dues wrote the Union requesting clarification. The Union responded to the letter stating that at the time it was uncertain as to the Petitioner's status and that it would be looking into the matter.

The Union has provided no authority, and I have found none, that states that a bargaining unit member's personal opinion or his/her failure to pay dues is evidence that the employee is not part of the bargaining unit.

As such, I reject each of the Union's arguments as unpersuasive.

CONCLUSION

In reviewing the evidence and applicable law, I conclude the Petitioner qualifies as a dual-function employee who shares such a community of interest with the other bargaining unit member (James Sward) that he is eligible to vote as part of the stipulated bargaining unit of "[a]ll full-time and regular part-time engineers and master control employees employed by the Employer at its Wausau, Wisconsin facility[;] excluding reporters, news photographers, on-air personnel, sales employees, traffic employees, production department employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act."

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military

services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Wisconsin Broadcast Engineers, Local Union 715, International Brotherhood of Electrical Workers, AFL-CIO-CLC.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203 on or before February 4, 2009.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by February 11, 2009.**

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Milwaukee, Wisconsin on January 28, 2009.

/s/Benjamin Mandelman

Benjamin Mandelman, Acting Regional Director
National Labor Relations Board
Thirtieth Region
310 West Wisconsin Avenue, Suite 700
Milwaukee, Wisconsin 53203

